UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CONF.152/C.1/SR.13
17 April 1991

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 13th MEETING

Held at the Austria Center Vienna,
on Thursday, 11 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

CONTENTS

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 10 (continued)
Article 11

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within five working days after the date of distribution of the record to the Executive Secretary of the Conference, room U 556 (before 19 April 1991) or room E0455 in the Vienna International Centre (after 19 April 1991).

Any corrections to these records will be consolidated in a single corrigendum, to be issued shortly after the end of the Conference.

V.91 37123 0097E

/...

Distr.: 19 April 1991

The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 10 (continued) (A/CONF.152/C.1/L.15, L.54)

1. The CHAIRMAN, referring to the discussion at the end of the previous meeting regarding article 10 (3), and in particular the phrase concerning the law of the State where the goods were located, said that, although such a reference to local law was not conducive to the uniformity of law that the Convention was seeking to achieve, its deletion would raise constitutional problems for certain States. Other States, on the other hand, while they might consider the phrase an unnecessary addition, at least did not regard it as positively harmful. In such circumstances, he wished to close discussion on the matter.

2. Mr. OCHIAI (Japan) said that he fully supported the point of view expressed by the Chairman. Deletion of the phrase "to the extent permitted by the law of the State where the goods are located" might well make it possible to interpret the text as allowing the operator to exercise the right to sell the goods unconditionally, which many States would regard as harmful.

3. Mr. OURZIK (Morocco), introducing his delegation's proposal relating to article 10 (3) (A/CONF.152/C.1/L.54), said that its purpose was to clarify a point that was not made clear in other provisions of the Convention, namely, the legal status of empty containers in a transport terminal, which should be treated as goods for the purposes of the Convention.

4. The CHAIRMAN said that article 10 (3), in its present form, permitted the operator to sell containers only in the event of claims for the cost of repairs of or improvements to them. As he understood the proposal, it aimed at treating empty containers as goods with the result that the operator would be able to exercise a right of retention over them.

5. Mr. OURZIK (Morocco) confirmed that interpretation.

6. Mr. WOOLLEY (Institute of International Containers Lessors), speaking at the invitation of the Chairman, said that the Moroccan proposal would be very difficult to accept for two reasons. Firstly, in his view, there should be no right to sell containers, whether empty or full, since they belonged to a party not involved in the claim. Secondly, the definition of empty containers as goods for the purposes of the Convention would cause problems. There existed throughout the world as many as a thousand industrial depots where empty containers were usually stored. If empty containers were defined as goods, there would be a real risk that such depots would be treated as container terminals. At present the relations between such depots and the leasing companies and shipping lines were based on contractual arrangements.

7. Mr. ZHAO Chengbi (China) said that treating empty containers as goods could raise many problems affecting not only the customer, but also the interests of third parties. He therefore felt unable to support the proposal.

8. Mr. LARSEN (United States of America) said that he could not support the proposal either, for the same reasons as the representative of China.

9. Mr. OURZIK (Morocco) said that he was aware that the question raised the problem of third parties, but wondered how the operator could recover his costs if the containers were not claimed by the owner or by the person entitled to take delivery of them. He fully understood the position of the Institute of International Containers Lessors (IICL). Although his delegation had been anxious to clarify a situation not covered by the Convention, it would not press the matter to a vote.

10. Introducing his delegation's proposal relating to article 10 (4), he said that its purpose was to give the operator the possibility of selecting one of the three persons with respect to whom he should make "reasonable efforts to give notice of the intended sale" rather than having to notify all three of them, namely, the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them, as at present required by the text.

11. Mr. MORAN (Spain) felt that the Moroccan proposal could be detrimental to the rights of the owner of the goods, since he would not have to be notified. The present text rightly stipulated that "reasonable efforts" must be made to give him notice; that might, for instance, mean sending a fax message. He felt unable to support the Moroccan proposal.

12. Mr. LEBEDEV (Union of Soviet Socialist Republics), noting that according to the present text, the operator was required to inform all three persons, said it might be thought that failure to give notice to any one of them meant that the operator could not sell the goods because he had failed to discharge all his responsibilities under the Convention. In practice, however, that situation would not be acceptable; and in any case such an interpretation of paragraph (4) would not be proper, since it called only for "reasonable efforts". If, for example, the operator did not know the address of one, or even two, of the persons concerned, but gave the information to the third one, that would constitute reasonable efforts to give notice and the operator would then be allowed to sell the goods. In other words, such a possibility already existed in the very language of the provision as it stood. There was therefore no need to change the present text.

13. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) agreed with the representative of Spain that it would be preferable to keep the existing text of paragraph (4).

14. Mr. TARKO (Austria) said that to sell the goods would be a drastic remedy. The operator must, therefore, give notice to all the persons concerned. In his view, the words "reasonable efforts" provided a flexible and satisfactory formulation. If the address of a person were not known, "reasonable efforts" to contact that person would be sufficient.

15. Mr. SCHROCK (Germany) fully supported the observations made by the representative of Austria. In substance, article 10 (3) made the right of retention a "lien", the legal effect of which would be that the operator could probably sell the goods even if they were not owned by his customer. Accordingly, he should at least make reasonable efforts to give notice to the actual owner of the goods. In the case of a precious item, for example, it was indispensable for its owner to be informed of an impending sale.

16. The CHAIRMAN invited the Committee to vote on the Moroccan proposal relating to article 10 (4) (A/CONF.152/C.1/L.54).

17. The proposal was rejected by 21 votes to 2, with 6 abstentions.

18. Ms. ZAWITOSKI (United States of America), introducing the United States amendment to article 10 (A/CONF.152/C.1/L.15), said that her delegation's proposal would grant the right of security in unclaimed or abandoned goods in respect of unpaid costs or claims due to the operator. It sought to tackle the problem of how long the operator must wait before exercising his right of security in such goods and starting the process of notice and sale mentioned in article 10 (3) and (4). The proposal sought to specify a uniform period of time after which the goods would be considered as having been abandoned. Without such a provision the period would be governed by national or local law and vary widely from State to State. Such a provision would promote certainty and provide a uniform definition of when goods could be deemed to be abandoned for the purpose of exercising rights of security. Although her delegation had proposed adding a new paragraph (5) and placing the second sentence of paragraph (3) in a new paragraph (6), she hoped that voting on the question would be focused on the principle underlying the proposal. If the principle was accepted, it could then be left to the Drafting Committee to refine the wording and decide on the best place for the amended text within article 10.

19. Mr. ROMAN (Belgium), observing that his delegation had submitted a similar proposal concerning the period of responsibility under article 3, fully supported the United States proposal.

20. Mr. TARKO (Austria) had some doubts as to the consequences of the proposed new paragraph (5) in article 10. As explained by the representative of the United States, the operator would be able, after a certain period of time, to consider the goods "abandoned". In the law of his country, the term "abandoned" would signify that they were given outright to the operator, who could then do what he wanted with them. His delegation would feel able to support the proposal if it were drafted in such a way that abandonment did not mean that the operator could do what he wanted, but was merely the first stage in a process leading to the right to sell the goods.

21. Mr. ZHAO Chengbi (China) thought that the period of responsibility after which the operator could treat the goods as abandoned was too short and wondered how many days could be considered a reasonable period. The proposal was acceptable in principle but needed to be drafted more carefully.

22. Mr. RUSTAND (Sweden) said that his delegation was of the view that the substance of the United States proposal already followed from article 3, since to "place at the disposal of" implied giving notice and calling on someone to collect the goods. If the customer or the person entitled to take delivery of the goods did not do so, the operator would be entitled to sell them. In other words, the only element added by the United States proposal was to specify the period of time after which that could be done. In his delegation's view, a specified period was unnecessary and would make the situation less flexible; it would be better to leave the matter for the operator to decide in the light of the circumstances. He agreed with the representative of Austria that the concept of "abandonment" might cause problems. He could, however, go along with the proposal, as he did not consider the issue a major one.

23. Mr. OCHIAI (Japan) said that terminal operators who were disadvantaged in the way in question ought to be covered by the right to sell the goods. Therefore, his delegation could not support the United States proposal.

24. Mr. ABASCAL (Mexico) said that customers frequently did not claim their goods and abandoned them. The United States proposal dealt with the matter in a reasonable manner and his delegation therefore supported it.

25. Ms. ZAWITOSKI (United States of America), replying to a question by The CHAIRMAN, said that the period of time in question might be 90 days. However, her delegation was prepared to consider alternatives.

26. Mr. HORNBY (Canada) said that his delegation supported the United States proposal, which it considered would add an element of certainty to the provision. With regard to the comments made by the representative of Sweden, he pointed out that the period of responsibility referred to in article 3 was rather vague.

27. Ms. SISULA-TULOKAS (Finland) said that the United States proposal would create more problems than it resolved.

28. Mr. CHRISTOV (Bulgaria) thought that the United States proposal deserved support.

29. Ms. SKOVBY (Denmark) said that her delegation fully supported the United States proposal.

30. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that everyone was familiar with the problem of lack of space in harbours and ports caused by the fact that customers failed to collect their goods properly. Nevertheless, his delegation had some doubts about including the United States proposal in the draft Convention. First of all, the duration of the period of responsibility had not yet been defined in article 3, and it was therefore difficult to indicate the point in time at which the operator would be entitled to sell or dispose of the goods. Secondly, account must also be taken of the different levels of development of countries involved in international trade. Some countries, such as those which were land-locked, were wholly dependent on others, and it would be difficult for them to accept an obligatory rule of a deadline after which terminal operators would be able to sell or dispose of goods. If those points were dealt with, his delegation might be in a position to support the proposal.

31. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, considered that the Committee should not adopt the United States proposal. In the national legislation with which he was familiar, there was a clear-cut distinction between the procedure for exercise of the right of retention and the procedure consequent upon abandonment or surrender. In the latter case, it would be necessary to obtain judicial authorization, which would determine whether the period of time required in order to decide that they had been abandoned had actually elapsed.

32. Mr. BONELL (Italy) said that article 3 had little to do with the issue raised in the United States proposal, since it was intended to define the period of responsibility. It tried to fix the time-limit after which the terminal operator would no longer be responsible for loss or damage to the goods because he would have fulfilled his contract. That did not mean that the goods would then be regarded as abandoned, but that they would remain at the terminal at the customer's risk. If no one came to the terminal, gave notice or explained why the customer was absent, that could sooner or later be regarded as abandonment of the goods by the customer. If the customer was prevented by force majeure from coming to the terminal to collect his goods and gave notice to that effect, paragraph (5) proposed by the United States would never apply.

33. With regard to the situation where after a certain time the goods were treated as abandoned by the customer because he had not collected them or given any notice to the terminal operator, the problem arose whether the Committee should decide on

(Mr. Bonell, Italy)

what was a reasonable period of time or leave it to be settled by national legislation. It would be preferable to resolve the question in a uniform manner, and he thought that the United States proposal could serve as a useful basis for further deliberations.

34. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that, in view of the difficulties that it would create for developing countries, his delegation was unable to support the United States proposal.

35. Mr. ROMAN (Belgium) thought that the United States suggestion of a period of 90 days was reasonable. However, if there were special circumstances, such as inclement weather conditions, it should be possible to extend the period between the time the goods were claimed and when they were collected. However, his delegation could not agree that the goods could remain for ever in the terminal, even at the customer's risk.

36. Mr. ZHAO Chengbi (China) said that the United States proposal was designed to solve a serious problem. The key issue was the number of days that could elapse after notice had been given before the goods could be regarded as abandoned. If the period was too short, it might be prejudicial to owners who were prevented from collecting the goods earlier by objective factors rather than subjective whim. That would create particular difficulties for developing countries. Although there was some support for a period of 90 days, the question was whetner it could be universally applicable. All in all, he thought that the problem might better be left to individual Governments to decide.

37. Mr. ROJANAPHRUK (Thailand) pointed out that the period of 90 days suggested by the United States after which the goods would be regarded as abandoned was the period within which the goods were to be claimed, not collected. In his opinion, that period was sufficient, but since the national law of countries varied, it might be more appropriate to say "within a reasonable period of time" and leave it to individual Governments to specify the duration.

38. Mr. SCHROCK (Germany) shared the views of the Italian representative on how article 3 should be interpreted. If the Committee should decide to adopt a specific time-limit, it should be longer than three months, since where property rights were involved, it was best to proceed with caution.

39. Mr. FILIPOVIĆ (Yugoslavia) said that although the proposal was a useful one, it would be difficult, if not impossible, to agree on a time-limit which would suit all States. He suggested that it should be left to the operator of the terminal where the goods were held to fix a time-limit which would take account of such factors as storage capacity and local weather conditions.

40. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said it seemed clear from the discussion that the United States proposal was unlikely to gain universal acceptance, since it gave rise to a number of problems, notably the problem of the time-limit. The idea that at the end of a certain period of time the operator would be entitled to claim the goods was already reflected in the existing text of article 10, and he agreed with the view that in such a case the national law of the country in which the goods were situated would be applicable.

41. Mr. NAOR (Israel) agreed that the question was one which should be decided by national law. In fact, once the goods had been abandoned, they would have a different legal status.

42. Mr. INGRAM (United Kingdom) said that the discussion had shown that there was considerable uncertainty as to how the proposal was to be interpreted from a legal viewpoint. To attempt to cover a number of different de facto situations by one simple general rule was not really feasible. Accordingly, his delegation would abstain on the proposal.

43. Mr. SULEIMAN (Nigeria) said that in his country, there were already regulations covering the disposal of abandoned goods: after three months, they would be the subject of notices in the official gazette, which would mean that they were liable to be handed over to receivers. Invariably, some 75 per cent of such goods were claimed by the owners.

44. Mr. RUSTAND (Sweden), in reply to the Italian representative, said he had not been suggesting that article 3 already covered the point raised by the United States, but rather that the legal concept of placing goods at the disposal of a person entitled to take delivery of them would provide the operator with a means of getting rid of them. If a customer failed to collect the goods within a certain period of time, storage fees would begin to accrue, and the operator could use his right of retention and sell the goods. The operator's interests were thus sufficiently protected, and there was no need to introduce the concept of abandoned goods. The proposal was unnecessary and would lead to a loss of flexibility.

45. Ms. ZAWITOSKI (United States of America) considered that a period of 90 days would be sufficient to give some degree of security to terminal operators operating on a world-wide basis. The period would not begin to run until after the expiry of the time during which the operator had agreed to keep the goods. Even after 90 days, there would be a further period during which the notice and sale provisions would apply. The time-limit would be for claiming the goods concerned, not for taking delivery of them. If some delegations had difficulty with the word "abandoned", her delegation would be willing to consider an alternative suggested by the Drafting Committee.

46. The CHAIRMAN invited the Committee to vote on the first of the two United States proposals (A/CONF.152/C.1/L.15).

47. The proposal was rejected by 12 votes to 11, with 9 abstentions.

48. Ms. ZAWITOSKI (United States of America) said that her delegation's consequential proposal for an addition to article 12 (A/CONF.152/C.1/L.18) would now fall. Her delegation withdrew its second proposal for an amendment to article 10 (A/CONF.152/C.1/L.15).

49. Article 10 was approved.

Article 11 (A/CONF.152/C.1/L.41, L.46, L.52)

50. Mrs. EL OTMANI (Morocco), introducing her delegation's proposal (A/CONF.152/C.1/L.52), said that in every paragraph of article 11, reference was made to "handing over" the goods rather than to "placing them at the disposal" of the person entitled to take delivery of them. That wording raised a number of questions: for example, what would happen to the goods if the customer failed to appear when the operator had placed the goods at his disposal, and was thus no longer responsible for them? What would be the time-limit applicable in such circumstances?

(Mrs. El Otmani, Morocco)

51. As now drafted, paragraphs (1) and (2) were highly unfavourable to the operator in that they allowed the customer, after taking delivery of the goods, to challenge the condition in which they had been received, and to claim compensation, merely by giving notice within a certain period of time. The customer could even make a claim against the operator for non-apparent damage when the goods had reached the final recipient, provided that notice was given within 15 days of their arrival. The paragraphs should be amended to provide that the period of notice would run from the date when the customer acknowledged the goods as his while they were still in the charge of the operator. Any such notice should be followed by investigations of the alleged damage, on the part of the customer and the operator respectively, while the goods were still in the warehouse and in the charge of the operator. The person entitled to take delivery of the goods would in any case be able to ascertain any loss or damage at the time the goods were handed over.

52. In her view, the physical handing over of the goods freed the operator from his obligation to safeguard them, and he was thus no longer responsible for any damage or loss sustained after the goods had been taken out of the storage area in the port. The periods allowed for notice by the customer under paragraph (2) were far too long and might lead to unlimited claims being made against the operator. Paragraph (3) made no provision for proof of participation by the operator in a survey or inspection of the goods.

53. The proposed amendment to paragraph (5) of article 11 consisted in the insertion of references to "placing the goods at the disposal of the person entitled to take delivery of them". Similar language appeared in paragraphs (3) and (4) of article 5 as approved by the Committee, and her delegation considered it necessary to harmonize the text of the draft Convention in that respect.

54. As regard the proposal to insert the words "the carrier" in paragraph (4) she said that to draw a parallel between article 11 (4) of the draft under consideration and article 19 (4) of the Hamburg Rules would be unfounded in view of the difference between the types of contract involved. Inspection and tallying of the goods could be properly carried out only with the participation of the person who had placed the goods in storage, or, in other words, the carrier or his representative.

55. In conclusion, she drew attention to the general comment appearing in the first paragraph of her delegation's proposal, to the effect that article 11, with the possible exception of paragraph (4), was superfluous and should be deleted.

56. The CHAIRMAN, noting that the Moroccan delegation's tentative proposal to delete article 11 with the exception of its paragraph (4) had received no support, invited the Committee to consider its amendments concerning paragraphs (1), (2), (3) and (5) of article 11 (A/CONF.152/C.1/L.52).

57. Mr. SOLIMAN (Egypt) said that he supported the amendments as a whole, and especially that relating to article 11 (1).

58. The Moroccan proposal relating to article 11 (1), (2), (3) and (5) was rejected by 18 votes to 4, with 11 abstentions.

59. Mrs. EL OTMANI (Morocco) expressed regret at the fact that none of the delegations voting against the proposal had seen fit to explain its position.

60. The CHAIRMAN invited the Committee to consider the proposal by Morocco concerning paragraph (4) of article 11 (A/CONF.152/C.1/L.52, p. 2).

61. Mr. BONELL (Italy) said that he considered the proposed addition of a reference to the carrier to be useful and would endorse it. He could not, however, go along with the proposal to add the words "at the place of storage or at any other place decided on by common agreement" at the end of the paragraph.

62. Ms. SKOVBY (Denmark) said that a reference to the carrier was unnecessary, since it was to be hoped that he would be identical with the "person entitled to take delivery of the goods". As to the proposed addition at the end of the paragraph, she thought that it was superfluous and would only create confusion.

63. Mr. INGRAM (United Kingdom) said that he shared the Italian delegation's views on both aspects of the proposal. He suggested that they should be put to the vote separately.

64. The CHAIRMAN said that he, for his part, could see some advantage in the carrier being present during the inspection and tallying of the goods.

65. Mr. LARSEN (United States of America) said the paragraph was adequate as it stood and the insertion of a reference to the carrier was unnecessary.

66. Mrs. PIAGGI DE VANOSSI (Argentina) said she found the first part of the proposal acceptable, but could not support the second part.

67. Mr. RUSTAND (Sweden) said that he was prepared to support both parts of the Moroccan amendment.

68. Mr. SCHROCK (Germany) said that, while understanding the object of the first part of the proposal, he would probably abstain on it because the draft under consideration was intended to govern the relationship between the operator and the customer and should not include any provisions relating to the carrier.

69. Mr. ILLESCAS (Spain) said that he was opposed to the second part of the Moroccan proposal, which imposed an unnecessary restriction upon the customer's prerogative of deciding where inspection and tallying of the goods should take place. He took a more favourable view of the first part of the proposal, which might be useful in the hypothetical case that the person entitled to take delivery of the goods was not the carrier.

70. Mr. OCHIAI (Japan) said that he would oppose both parts of the amendment. Where the carriage of the goods involved several contracts, the identity of the carrier referred to might be difficult to establish.

71. Mr. SULEIMAN (Nigeria) said that he supported the proposal, in view of the carrier's central role in the operation of landing the goods.

72. Mrs. EL OTMANI (Morocco), replying to the point raised by the representative of Denmark, said that under the Hamburg Rules a carrier who had handed the goods over to the operator was released from his obligations and could no longer be defined as a "person entitled to take delivery of the goods" for the purposes of inspecting and tallying them. In reply to the representative of Japan, she said that the carrier referred to in the proposal was, as it were, the one at the end of the line, or, in other words, the one who handed the goods over to the operator.

73. The CHAIRMAN invited the Committee to vote on the first part of the Moroccan proposal on article 11 (4) (A/CONF.152/L.52), namely, the insertion of the words "the carrier" in the second line of the paragraph.

74. The proposal was adopted by 17 votes to 11, with 6 abstentions.

75. The CHAIRMAN invited the Committee to vote on the second part of the proposal, namely, the addition of the words "at the place of storage or at any other place decided on by common agreement" at the end of the paragraph.

76. The proposal was rejected by 19 votes to 5, with 9 abstentions.

77. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the addition of a reference to the carrier to article 11 (4) did not in any way affect article 15, still to be discussed by the Committee. Furthermore, the new wording did not render the carrier's presence imperative; non-participation on the carrier's part could not affect the interests of the operator or of the person entitled to take delivery of the goods.

78. The CHAIRMAN concurred with those views. The amendment just adopted did not imply any change in article 15 of the present draft or in the transport conventions. While the carrier was under an obligation to co-operate with the operator and the person entitled to take delivery of the goods, failure on his part to do so would not stand in the way of inspecting and tallying the goods.

79. Mr. LARSEN (United States of America) also associated himself with the points made by the Soviet representative.

The meeting rose at 12.40 p.m.